

NJDOT Division of Local Aid and Economic Development
Summary of Project Management Eligibility Requirements for
Locally Administered Federal Aid Highway Projects

Attachment 1

(Revised September 20, 2019)

Introduction

This document is intended to be used as a guide by LPA's in the development and implementation of procedures for projects using FHWA funds. Please note that this document is a summary of the federal requirements that must be established to be utilized during the administration of a project by the LPA. This document is not intended to be a comprehensive list of all federal requirements to be met once a project is authorized.

Each LPA seeking federal-aid funds must complete NJDOT's Division of Local Aid's Federal Aid Eligibility Assessment Form (EAF). The EAF was developed to assess the risk associated with providing federal funds to an LPA based on its accounting controls and administrative management systems.

The following guidance has been developed to identify risk areas which have been identified by the NJDOT. LPA's must address these areas in any required procedures as part of the eligibility assessment.

Procurement of Professional Services– Consultant Selection

Consultant Services funded in whole or in part with FAHP funds must be procured and administered in accordance with the requirements of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2CFR 200). In addition, contracts for engineering and design related services directly related to a construction project must also comply with the requirements of 23 U.S.C. 112 and 23 CFR 172.

Any LPA using Federal-aid funds for engineering and design related consultant services must have written procurement policies and procedures in accordance with 23 CFR 172.9. The written policies and procedures must address:

- Preparation of the consultant scope of work and cost estimate
- Solicitation, evaluation, ranking, and consultant selection
- Negotiation of reimbursement costs
- Monitoring of the consultant's work
- Consultant errors and omissions

Title 23 CFR 172 allows three procurement methods to be used to hire a consultant: competitive negotiation, small purchases and noncompetitive procurement. Competitive negotiation procedures generally apply and are commonly referred to as “qualification based selections”. Qualification based selection requirements are defined by the Brooks Act, 40 U.S.C, and can be broken down into three steps:

1. Issuing a request for proposal, or RFP.
2. Selecting a consultant based on qualifications.
3. Negotiating a fair and reasonable cost and contract terms with the selected consultant.

Request for Proposal-Process

1. The LPA must have a written procedure detailing their consultant selection process for federal-aid projects. This procedure must be approved by NJDOT for compliance to federal requirements.
2. The RFP must include a detailed scope of work, qualifications required, responsibilities, and deliverables. Completed work efforts supporting the proposed work, if applicable, must be included within the RFP.
3. The RFP must include an estimated schedule for the performance and delivery of the services.
4. The RFP must stipulate method of contract payment.
5. The RFP must clearly define the LPA’s evaluation criteria used to assess and rate the firms including the scoring rate of each criterion.
6. The qualification based evaluation criteria may take into consideration qualifications of staff, prior similar work experience, past performance, workload capacity, and technical project approach.
7. In-state or local hiring preferences are prohibited.
8. Consideration of price or any element of cost in the evaluation is prohibited in the evaluation, ranking, and selection of the most qualified consultant.
9. The RFP must be advertised for a sufficient amount of time to solicit as many proposals from as many qualified consultants as possible.
10. The RFP process must allow fair and open competition by providing opportunities for in-State and out-of-State consultants.
11. The LPA shall follow federal requirement 23 USC 112 which requires that bidding methods be employed on federal-aid contracts that are effective in securing competition. Section 112 of Title 23 USC mandates competitive bidding on contracts. 23 USC 112 also states that no requirement or obligation shall be imposed as a “condition precedent” to the award of a contract. To ensure that any contracts utilizing federal funds are not in conflict with any federal requirements, LPA’s shall include the following language in any federally funded contracts:

“Proposals are being solicited through a fair and open process in accordance with NJSA 19.44A-20.2, et seq.,and as such, contractors are exempt from the limitations on making

political contributions under that law. Further, for that reason, as well as because of the language in the New Jersey's Annual Appropriations Act, refusal to disclose campaign contributions otherwise required by NJSA 19.44A-20.2 et seq., and 19.44A-20.25 et seq., will not adversely affect your condition for award."

LPA's shall include the above language in all bid solicitations funded with subgranted federal funds.

Selection

12. All submitted proposals must be evaluated and ranked according to the evaluation criteria and scoring process outlined in the RFP.
13. A short list of the most qualified consultants should be listed in order of preference.

Negotiations

14. The LPA must prepare an independent cost estimate that reflects the advertised scope of work to be used as the basis of negotiations.
15. Negotiation of costs and contract terms are conducted with the number-one ranked qualified consultant.
16. Only the tasks included in the RFP can be incorporated in the contract.
17. NJDOT is required to ensure the consultant contract is compliant with FAR cost principals when using federal-aid funds.
 - Allowable costs include those directly associated with the specific contract as well as overhead costs, also known as their indirect cost rate.
 - Only NJDOT approved overhead rates are used. Consultants that do not have approved overhead rates must be approved in accordance with NJDOT Procurement policies and procedures.
 - The approved overhead rate must be used for the purpose of estimating, negotiating, and making payment on the contract.
18. The methods of payment that shall be used are: lump sum, cost plus fixed fee, cost per unit of work or specific rates of compensation.
 - Lump Sum: The lump sum method shall not be used to compensate a consultant for construction engineering and inspection services except when the agency has established the extent, scope, complexity, character and duration of the work to be required to a degree that a fair and reasonable compensation including fixed fee can be determined.
 - Cost plus fixed fee: This method of payment reimburses the consultant for its direct and indirect costs (salary, overhead, direct expenses) in addition to a negotiated amount as a fixed fee. This type of agreement is typically used for projects where the level of effort is unknown or the final objectives cannot be fully identified or precisely defined.

- Cost per unit of work: This method is used when the cost per unit can be established with reasonable accuracy at the time of procurement, but the extent of the work is undefined. Payment is made based on a preset amount per unit of work performed.
- Specific rates of compensation: this method of payment reimburses the consultant for services based on direct labor hours at specific fixed hourly rates plus direct expenses/costs subject to an agreement maximum amount. The specific rates of compensation method should only be used when it is not possible to estimate the extent or duration of the work or to estimate costs with any reasonable degree of accuracy at the time of procurement.

19. The cost plus a percentage of cost and percentage of construction cost method of compensation shall not be used.

Contract Administration

20. The LPA must monitor the consultant's work throughout the life of the contract.
21. The LPA must be adequately staffed to oversee the work, and must provide one full time agency employee in responsible charge.
22. The LPA will submit the following to the NJDOT for reimbursement of partial payment vouchers: Partial payment (as per funding agreement on Form PV); Progress Report; Change Order (prior approval of change required); Evidence of costs to date incurred in the form of certifications or receipts of contractor payments (two copies of backup payments must be submitted) and any other supporting backup documentation pertaining to costs incurred for that period. NJDOT will review invoices to ensure costs are consistent with FAR cost principals, contract terms, and progress of consultants work.
23. The Agreement between the LPA and the NJDOT may be terminated by either party upon thirty (30) days written notice to the other party. Costs incurred by the LPA as a result of the termination by the NJDOT may be included in the LPA's claim for compensation. Costs incurred by the NJDOT as a result of the termination by the LPA may be set off against the LPA's claim for compensation under the terms of this Agreement or any other Agreement between the NJDOT and LPA until the costs have been fully repaid. The LPA shall make any requests in writing.
24. The final closeout process of a federally funded project consists of three distinct actions: Final Invoice Acceptance (Payment), Step 7A Request (Federal Acceptance), and Records Retention once the project is fully closed. For the actions of Final Invoice and Federal Acceptance, the LPA shall submit to NJDOT the following documents:
- Payment Voucher PV(C)-along with any backup documentation to substantiate all project costs (two copies must be submitted))
 - Payment summary with all contract items/As-Builts or Purchase Order
 - Copy of check as evidence of Payment made
 - Chief Financial Officers Certification indicating the project cost is part of the single audit or the final project will be made part of the next annual single audit.

If neither is the case, then an Independent Auditor's Certification of final project cost is required.

- Engineer's Certification-Project Completion-Original Copy
- LPA Release Statement from agreement for Federal Aid
- Form DC-173A-Federal Aid Change Order (2 pages)
- List of all As-built Quantities
- Form FHWA-47-Statement of Materials and Labor (for all NHS projects or projects over \$1 million dollars in construction costs)
- Any other documents that apply under special circumstances in accordance with the Local Aid "Federal Procedures Handbook"

25. The LPA is required to evaluate the consultant's performance when the contract is complete.

26. All records pertaining to the consultant procurement and executed contract must be kept on file a minimum of 3 years following submittal of the final invoice.

Project Management

Responsible Charge

Title 23 CFR 635.105(a) (4) requires LPA's to provide a full-time employee to be in responsible charge of Federal-aid construction projects. The person in responsible charge of LPA administered projects need not be an engineer. The "responsible charge" requirement applies even when a consultant is providing construction engineering services.

The LPA responsible charge is accountable for the project and expected to perform the following duties and functions:

- Administers inherently Government project activities, including those dealing with cost, time, adherence to contract requirements, construction quality, and scope of Federal-aid projects.
- Maintains familiarity of day to day project operations, including project safety issues.
- Makes or participates in decisions about changed conditions or scope changes that require change orders or supplemental agreements.
- Visits and reviews the project on a frequency that is commensurate with the magnitude and complexity of the project.
- Reviews financial processes, transactions and documentation to ensure that safeguards are in place to minimize fraud, waste, and abuse; and
- Directs project staff, agency or consultant, to carry out project administration and contract oversight, including proper documentation.
- Is aware of the qualifications, assignments, and on-the-job performance of the agency and consultant staff at all stages of the project.

Federal regulations do not preclude the sharing of these duties and functions among a number of LPA employees, nor do the regulations preclude one employee from having responsible charge of several projects and directing project managers assigned to specific projects.

Construction Inspection

Title 23 CFR 635.105 requires projects receive adequate supervision and detailed construction inspection to ensure construction is completed in conformance with the approved plans and specifications. Likewise, LPA's are required to be adequately staffed and suitably equipped to undertake and satisfactorily complete this work. The LPA's detailed inspections and related source documents are the basis for payment of completed work. Title 23 CFR 635.123 requires LPA's to have procedures in place to inspect and verify delivery and quality of materials and ensure that work has been completed in accordance with the plans and specifications. Source documentation should be reflected in inspector reports, daily diaries and engineering calculations.

Source Documentation

Title 23 CFR 635.123 requires each LPA to adopt procedures that provide adequate assurance that the quantities of completed work on federal-aid construction projects will be determined accurately and on a uniform basis. All such determinations and all related source documents upon which payment is based must be a matter of record. Additionally, all source documents pertaining to the determination of pay quantities must be retained for three years after final payment and project close-out pursuant to 2 CFR 200.333-Retention Requirements for Records.

Source documents are the LPA's handwritten receipt of exactly what was delivered, and how many or how much. They are the single most important form of documentation that substantiate quality and quantities and provide the required basis for payment to the contractor. Lack of source documentation can result in the loss of federal participation of funds. Source documents consist of notes/documentation of counts; measurements (length, width, depth, and slope); calculations of area, volume, weights; sketches; a statement of compliance with contract plans and specifications; field changes; comments; and delivery tickets collected and initialed by the inspector at the point of unloading.

The LPA's procedures for source documentation must specify the following at a minimum:

- Delivery tickets are received before placement of materials
- Testing of materials is documented in the project files and referenced in daily inspection reports
- Form DC-29's are used for daily inspection reports and the instructions included on the DC-29's are followed. DC-29's are supplemented with field notes and photographs that tie the work being done to the plans, specifications and related contract documents.
(<http://www.state.nj.us/transportation/business/localaid/documents/DC29aWI.pdf>)
- Inspection reports are signed and dated by the inspectors.
- The Resident Engineer reviews and initials the daily inspection reports.

- The Resident Engineer prepares a summary of pay quantities based on the daily inspection reports
- The Resident Engineer uses the summary of pay items to develop periodic pay estimates for the LPA person in responsible charge. The summary of pay items must be used for comparison and negotiations of contractor payment requests. The LPA person in responsible charge must ensure proper payments are being made in accordance with the contract provisions. Upon acceptance of the negotiated contractor payment, a voucher request will be forwarded to the LPA financial officer for contractor payment. Once contractor payment is made, the LPA financial officer must prepare and submit a State voucher.
- Prevailing wage rate requirements of 23 U.S.C. and the Davis- Bacon Act must be met and documented in the LPA's project files.
- Environmental commitments and/or permit requirements must be met and documented in the daily inspection reports.
- All pedestrian facilities must be constructed or reconstructed in accordance with the American with Disabilities Act (ADA) of 1990; Section 504 of the Rehabilitation Act of 1973; 28 CFR Part 35.151 (e) and NJDOT Standard Construction Details and the NJDOT Design Manual.
- DBE requirements are monitored and enforced to ensure compliance with 49 CFR 26; the contract plans, specifications and related contract documents; the NJDOT Construction Handbook Section V, Subsection B and NJDOT DBE/ESBE Programs.
- Include provisions to identify the LPA's full time employee in "responsible charge" of the project.
- Any direct expenses associated with the contract should also be monitored.

Buy America

Title 23 CFR 635.410 requires that all steel and iron products permanently incorporated within the scope of the NEPA determination for a FHWA project, regardless if a specific contract does not utilize FAHP funding, must be manufactured in the United States." This includes application of coatings.

Buy America requirements apply to the entire federal-aid project. Steel or iron products purchased with non federal funds are not exempt from this requirement.

Waivers are permissible in rare cases as specified in 23 CFR 635.410 (c) (1). Minimal use of foreign steel or iron is permissible if the costs of such materials does not exceed one-tenth of one percent of the total cost or \$2,500, whichever is greater as specified in 23 CFR 635.410 (b)(4). Buy America references from the latest version of the NJDOT Standard Specifications 10.03 and 106.07.02 also apply.

The LPA responsible charge is responsible for receiving the Buy America certification at time of delivery and prior to the steel or iron product being incorporated into the project. The Buy America certification must be current, signed, and dated and be specific to the materials.

Title VI-DBE Compliance

Title VI-The law requires that NJDOT, as a federal-aid recipient, and its sub-recipients and contractors prevent intentional or unintentional discrimination in all programs and activities and comply with the [Title VI of the 1964 Civil Rights Act](#) (pdf 14k), as amended. LPA's receiving federal funds are required as a subrecipient to comply with this law. LPA's are required to maintain a signed Title VI Nondiscrimination Policy statement. Additional information (including a presentation) with regard to this requirement can be found at:

<http://www.state.nj.us/transportation/business/civilrights/titlevi.shtm>

DBE Compliance-Title 49 CFR 26 requires that Disadvantaged Business enterprises (DBE's) have an equal opportunity to receive and participate in federal-aid assisted construction contracts. The LPA is responsible to award federal-aid contracts to only those bidders who make a good faith effort to meet the DBE goals established by NJDOT's Civil Rights Contract Compliance Unit. The LPA must continuously monitor DBE participation as the project progresses and is responsible for ensuring the contract goals will be met at the time of project completion. Failure to comply with DBE goal requirements may result in the loss of federal funding. The LPA's responsibilities include:

1. Verification of Recommendation to Award memorandum and Form CR-266F, "Schedule of DBE/ESBE Participation (former "Form A") to determine status of the subcontractors to monitor DBE/ESBE compliance.
2. Monitor participation by comparing contractors DBE/ESBE/SBE goal commitments against each Form DC-18, "Request for Approval to sublet". Cross check the Daily Work Reports with each affected Form DC-18, the Recommendation to Award, and the Form CR-267, Monthly Report of Utilization of ESBE/DBE or SBE.
3. Utilize Daily Work Report to document on-site monitoring of stipulated DBE work items and contractor performing the work to insure compliance.
4. The person in responsible charge must be made aware of non-compliance issues and direct the contractor in writing to comply with these requirements. Revisions can only be made to the approved DBE/ESBE/SBE program upon submission of a revised Form CR 266 by the contractor and review and approval by NJDOT.
5. Any DBE/ESBE/SBE goal commitments not fulfilled must be supported by Good Faith Effort documentation and reviewed and approved by NJDOT based on the guidance set forth in 49 CFR 26 Appendix A.

Contract Changes, Project Schedules, Project Progress, Contract Completion

Contract Changes

Title 23 CFR 635.120 and Section 104.03 of the NJDOT Standard Specifications govern changes in plans and specifications, and extra work. Deviations from the contract requirements shall not occur unless the

Resident Engineer issues a written field order or a Change Order is approved by the Department. Change Orders require written justification: breakdown of costs and quantities; and timely approvals. Contract changes and progress of work must be monitored daily. Types of changes include quantity increases and decreases; new work; and changes in the character of work.

Contract line item overruns are not permissible without NJDOT approval. Any sum in excess of the contract's current authorized funding amount cannot be expended until a Change Order is approved by NJDOT. All new or supplemental costs must be negotiated, itemized and justified. All documentation including a cost analysis of each negotiated cost must be included in the Change Order request and maintained in the project file.

Time shall always be evaluated as part of a change order. Extensions in contract time related to contract changes or extra work will only be granted for excusable, compensable delays as defined in Section 108.10 of the NJDOT Standard Specifications.

Contract Time

Contract time must be specified in the bid documents for all federal-aid projects, monitored by the local public agency each work day, and documented. A pre-construction conference shall be promptly scheduled following contract award and a Notice to Proceed (NTP) issued specifying the NTP date, project duration, and contract completion date.

Delays in work progress and completion result in delays in the use of the project, inconvenience to the public and increased inefficiencies leading to additional costs incurred by the NJDOT and the LPA for engineering, inspection, and contract administration. The NJDOT Standard Specifications summarizes it simply by stating "Time is of the essence as to all time frames stated in the Contract." Every effort should be made to establish contract times that have the shortest practical durations.

Contract time extensions will only be granted for excusable delays specified in Section 108.11 of the NJDOT 2007 Standard Specifications. Contract time extensions must be submitted and approved by Change Order as the project progresses and at the time an excusable delay occurs.

Liquidated Damages

Liquidated damages must be specified for all federal-aid projects. Liquidated Damages are defined as the daily amount set forth in the contract to be deducted from the contract price to cover additional costs incurred by the local public agency because of a contractor's failure to complete work within the specified Contract Time.

Liquidated damages must be assessed by the LPA for each day the contractor fails to complete work within the specified Contract Time. Failure to assess liquidated damages by the local public agency in accordance with the contract bids documents and federal-aid requirements may result in the loss of federal participation of funds.

Progress Schedules

The LPA is responsible for providing a progress schedule and monitoring contract progress to evaluate impacts to contract time pursuant to Section 153 of the NJDOT Standard Specifications.

Progress payments are compensation for the value of work performed during a covered period as specified in Title 23 CFR 635.123. The LPA is responsible for documenting the project's progress, contractor payments, and contract completion to ensure adherence to the approved project schedule and specified contract time. The covered period should coincide with the contract time and be within the Period of Performance and End Date established within the contact agreement between the LPA and the NJDOT.

Disposition of Change Order Protests

Title 23 CFR 635.109 prescribes standardized changed conditions contract clauses for differing site conditions; suspensions of work ordered by the engineer; and significant changes in the character of work on all federal-aid construction projects. The LPA is responsible for resolving protests to change orders in accordance with 23 CFR 635.109 and Section 104.03.02 of the NJDOT 2007 Specifications.

If the contractor disagrees with any terms or conditions of a Change Order, a written protest must be submitted to the LPA within 15 days of receipt of the Change Order. The LPA will notify the NJDOT as soon as possible. (Agreement language and claims language; NJSA 59:13-1)

Submission of a written protest does not relieve the contractor from the obligation to proceed with work as directed by an approved change order.

Right of Way Acquisition

Any LPA utilizing federal funds to purchase Right of Way shall follow applicable federal and state requirements. Public Law 91-646, The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, commonly called the Uniform Act, is the primary law for acquisition and relocation activities on Federal or federally assisted projects and programs.

Federal real estate acquisition statutes and regulations include:

United States Code (U.S.C.)

- Title 23 - Highways
- Title 42, CHAPTER 61 - Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs
- Title 49 - Transportation

Code of Federal Regulations (CFR)

- 23 Part 710
- 49 Part 24

Other Federal, State, and local laws also govern public project and program activities.

Whenever any FHWA funding is used in a project (even if not used for right of way acquisitions) the FHWA exercises full oversight of the right of way acquisition process. In the case of locally lead projects, FHWA has delegated NJDOT the authority to review and approve any procedures associated with the right of way process.

For additional guidance, the NJDOT has developed a Right of Way Acquisition Manual which is located at:

https://www.state.nj.us/transportation/eng/documents/BDC/pdf/ROW_Acquisition_Manual_20190913.pdf

FHWA also has a publication called the Real Estate Acquisition Guide for Local Public Agencies which is located at:

https://www.fhwa.dot.gov/real_estate/local_public_agencies/lpa_guide/index.cfm

Questions regarding federal-aid compliance can be directed to one of NJDOT's Local Aid District Offices. District Office contact information can be found on the Local Aid website at:

<http://www.state.nj.us/transportation/business/localaid/>

The "Summary of Project Management Eligibility Requirements for Locally Administered Federal Aid Highway Projects" and the NJDOT's Division of Local Aid's Federal Aid Eligibility Assessment Form can also be found on the Local Aid website.